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In The

Supreme Court of the United States

October Term, 1992

ROBERT P. HAGEN,

Petitioner,

v.

STATE OF UTAH,

Respondent.

On Writ Of Certiorari
To The Utah Supreme Court

BRIEF OF THE NAVAJO NATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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BRIEF OF THE NAVAJO NATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

INTEREST OF THE *AMICUS CURIAE*

This case concerns whether use of the phrase "restore to the public domain" in federal legislation opening an Indian reservation provides substantial and compelling evidence of a congressional intent to disestablish that reservation. The Tenth Circuit held that it does not and that the Uintah reservation was not disestablished. *Ute Indian Tribe v. Utah*, 773 F.2d 1087 (10th Cir. 1985) (*en banc*), *cert. denied*, 479 U.S. 994 (1986) ("*Ute*"). The Utah Supreme Court here held to the contrary and found that the Uintah reservation was disestablished, relying on *State v. Perank*, 191 Utah Adv. Rep. 5 (1992).

The Navajo Nation is vitally interested in the outcome of this case. In 1908 and 1911, unallotted land in a 1.9 million acre part of the Navajo reservation in New Mexico was "restored to the public domain" under a 1908 act of Congress.[1] The Navajo Nation initially prevailed in litigation concerning the reservation status of this area, but a panel of the Tenth Circuit reversed. *Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387 (10th Cir.), *cert. denied*, 498 U.S. 1012 (1990) ("*Yazzie*"). The opinion in *Yazzie* acknowledged that neither the statute nor its sparse legislative history adverted to reservation boundaries or jurisdictional matters. However, *Yazzie* summarily rejected the factual findings of the district court, constructed an "executive intent" which it "inferred" to Congress, and concluded that use of the operative phrase "restore to the public domain" extinguishes reservation boundaries – dismissing the contrary holding of the *en banc* court in *Ute* as "unexamined and unsupported." *Yazzie*, 909 F.2d at 1393-94 & n.7, 1395-96 & n.9, 1400, 1404 n.23 and 1419. Rehearing *en banc* was denied by an evenly divided court.

Last week, on June 11, 1993, the district court held in favor of the company on the remaining issues on remand from *Yazzie*. The Navajo Nation seeks to preserve its ability to urge successfully that the Tenth Circuit's ruling on disestablishment in *Yazzie* should be reconsidered under established law of the case principles. *See* 1B

[1] Act of May 29, 1908, ch. 216 § 25, 35 Stat. 444, 457. *See* Executive Orders Nos. 1000 (Dec. 30, 1908) and 1284 (Jan. 28, 1911), *reprinted in* III Charles J. Kappler, *Indian Affairs: Laws and Treaties* 685-86 (1913).

Moore's Federal Practice ¶ 0.404[4.-6] (1993). New and undisputed evidence from the 1990 census reveals that 10,772 of the 11,334 of the residents – fully 95% – in the disputed area are Indians;[2] indeed, most of the non-Indians living there work for the BIA or Indian Health Service. Less than 15% of the land is owned in fee by non-Indians, and the Navajo Nation and United States provide almost all of the services in the area.[3] Both Congress and the Executive branch consistently regarded the entire area as part of the Navajo reservation.[4] The court in *Yazzie* justified its wide-ranging appellate fact-finding on grounds which this Court found improper in *Arkansas v. Oklahoma*, 112 S. Ct. 1046 (1992), *reversing Oklahoma v. EPA*, 908 F.2d 595 (10th Cir. 1990). And *Yazzie*'s imputation of congressional intent upon selected documents

[2] *Cf. Duro v. Reina*, 495 U.S. 676, 695 (1990) (non-Indians outnumber Indians on most reservations).

[3] *See Pittsburg & Midway Coal Mining Co. v. Saunders*, No. CIV 86-1442 M (D.N.M. Aug. 22, 1988), reproduced at 909 F.2d 1387, App. C at 1432, 1436-37 (10th Cir.) ("*Saunders*") ("The contribution of the State of New Mexico is small. . . . The prominent law enforcement agency in the . . . area is the Navajo Nation Police. The vast majority of civil and criminal disputes are litigated in Navajo Tribal Court. The Tribe proved up many more indications, too numerous to detail here, of the dominance of the Navajo Nation over life in the . . . area."), *rev'd on other grounds*, 909 F.2d 1387 (10th Cir.), *cert. denied*, 498 U.S. 1012 (1990).

[4] Congress termed the area the Pueblo Bonito "reservation" or "subdivision of the Navajo Reservation" in nine appropriations acts from 1919 to 1927, and maps and annual reports of the Commissioner of Indian Affairs from 1908-1927 generally depicted and described the area as an "opened reservation." *Saunders, supra* n.3, 909 F.2d at 1436.

never seen by any member of Congress cannot survive *Negonsott v. Samuels*, 113 S. Ct. 1119, 1124 n.4 (1993).

Thus, only if this Court determines that use of the operative phrase "restore to the public domain" automatically provides substantial and compelling evidence of a congressional intent to disestablish can the court's decision in *Yazzie* withstand scrutiny. *See Solem v. Bartlett*, 465 U.S. 463, 472 (1984). The Navajo Nation's research reveals that use of the phrase "restore to the public domain" has no overriding significance in the diminishment context, and files this brief to preserve its interest in maintaining law and order in the opened part of its reservation. *See id.* at 471 n.12.

SUMMARY OF THE ARGUMENT

In *Ute*, the Court of Appeals, *en banc*, held that the Uintah Reservation was not diminished by legislation opening it to non-Indian entry. Consistent with *Solem v. Bartlett*, 465 U.S. 463, 475 n.17 (1984), *Ute* held that it was equally plausible that use of the phrase "restore to the public domain" simply meant that Indian lands would be available for settlement but that reservation boundaries would remain unchanged, and the *Ute* court was unable to find elsewhere the "substantial and compelling" indications of a congressional intent to diminish required by *Solem v. Bartlett*, 465 U.S. at 470-72. In holding to the contrary with respect to the same Indian reservation, the

Utah Supreme Court relied solely on *State v. Perank*, 191 Utah Adv. Rep. 5 (1992), which concluded first that use of the phrase "restore to the public domain" provides "persuasive" evidence of a congressional intent to diminish and which devoted the rest of the opinion to concluding that the 1905 opening legislation which did not use the phrase merely amended a 1902 act which did.

The first conclusion in *Perank* is erroneous, and the second is therefore immaterial. The phrase "public domain" has never had an official meaning, and it typically describes land subject to disposal under general laws. This Court has consistently rejected the notion that the term "public domain" or "public lands" has a precise meaning without reference to a definitional section or its context in a statute.

Indeed, *Perank*'s only support for the position that use of the phrase "restore to the public domain" signals disestablishment is a later panel decision of the Tenth Circuit, *Yazzie*, which is based on inconclusive dictionary references, an internally contradictory report issued in 1880, inferences and deductions bordering on speculation, and the unique view that it was empowered to reject as "unexamined and unsupported" the considered legal conclusions of a prior *en banc* opinion of the same court of appeals. *Yazzie*, 909 F.2d at 1400. The authority cited in *Yazzie* is not only insubstantial; if taken at face value, much of it supports the view that the phrase "restore to the public domain" was thought historically to affect only land titles and not governmental jurisdiction.

Although *Yazzie* gives superficial sanction for Utah's opportunistic misuse of a petty criminal prosecution solely to relitigate *Ute*, this case shows the pitfalls of such manipulation. Utah stated to the court of appeals in *Ute* that the district court committed no reversible error in holding that the area of the Uintah Reservation at issue here was not diminished, and even the counties and cities of Utah which *did* appeal represented to the *Ute* court that its decision would settle "once and for all" the jurisdiction of the area. Allowing Utah to prevail here on the one-sided record it developed below would encourage state attorneys throughout the country to create conflicts with settled diminishment decisions of the lower federal courts, requiring resolution here.

ARGUMENT

I. THE DECISION BELOW RESTS ULTIMATELY ON *YAZZIE*, A PANEL DECISION WHICH EXPLICITLY REJECTED THE CONSIDERED LEGAL CONCLUSIONS OF A PRIOR *EN BANC* DECISION OF THE SAME COURT OF APPEALS.

In 1985, the Court of Appeals for the Tenth Circuit, sitting *en banc*, held that Congress did not disestablish the Uintah Reservation. *Ute*, 773 F.2d at 1090. *Ute* reasoned that because "it is equally plausible that the phrase means that Indian lands would be available for settlement but that the boundaries remain unchanged . . . [t]he . . . expression 'return to the public domain' does not reliably establish the clear and unequivocal evidence of Congress' intent to change boundaries" required under

Solem v. Bartlett, 465 U.S. 463 (1984). *Ute*, 773 F.2d at 1092. As the petition for certiorari in *Ute* and related submissions filed in this Court show, all persons with an interest in the Uintah reservation – the United States, the tribe, the State of Utah, the counties and cities, and even a landowner in the opened Navajo reservation in New Mexico – participated in that case, and the significance of the phrase "restore to the public domain" was *the* central issue in that case. With the benefit of the arguments of all parties, the *en banc* Court of Appeals held in *Ute* that the phrase was not sufficient to show a congressional intent to disestablish.

Later, in *Yazzie*, the party urging disestablishment of the Navajo reservation in New Mexico asserted to the Court of Appeals that use of the phrase " 'restore to the public domain' . . . was then, and is now, a legal term of art . . . [which] terminated all reservation status for the area."[5] Because no panel of the Court of Appeals has the authority to reject the considered legal conclusions of a prior *en banc* decision of that same Court of Appeals,[6] the Navajo Nation devoted only one-half page of its answer brief to that issue, relying on *Ute* and *Solem v. Bartlett*, 465 U.S. at 475 n.17. However, the *Yazzie* panel resurrected the dissent in *Ute* and, as the Utah Supreme Court observed, "rejected" the conclusions of the *Ute* majority with respect to the effect of restoration language. *State v. Perank*, 191 Utah Adv. Rep. 5, 9 (1992).

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[5] Brief of the Pittsburg & Midway Coal Mining Co., Appellant at 6, No. 88-2413 (10th Cir. 1988).

[6] *See Fed. R. App. P.* 35.

In proceedings below, the Utah Court of Appeals was aware that the Utah Supreme Court in *Perank* was being asked to ignore *Ute*. Unimpressed, the Utah Court of Appeals reversed Hagen's conviction, "[s]eeing no possibility of an effective decision in *Perank* contrary to the result in *Ute Indian Tribe*." *State v. Hagen*, 802 P.2d 745, 747 (Utah App. 1990), *rev'd*, 191 Utah Adv. Rep. 26 (1992).

In *Perank*, however, the Utah Supreme Court observed that *Yazzie* "clearly departs from the court's prior conclusion in *Ute Indian Tribe* as to the effect of restoration language. Indeed, *Yazzie* held that use of operative restoration language diminishes a reservation as to the land restored to the public domain." *State v. Perank*, 191 Utah Adv. Rep. 5, 10 (1992). Almost exclusively in reliance on *Yazzie*, the Utah Supreme Court in *Perank* concluded that operative restoration language "is persuasive evidence of congressional intent to diminish." *Id.* The rest of the *Perank* opinion is largely devoted to showing that the 1905 act of Congress which actually opened the Uintah reservation but which did not use the phrase "restore to the public domain" was merely amendatory of a 1902 act which did. *Id.* at 10-18. Notably, *Perank* was litigated at all stages without any effective participation of the United States or the Ute Indian Tribe. *Id.* at 22 (Zimmerman, J., dissenting) (referring to the "virtually unchallenged" arguments of Utah on the boundary question).

Based solely on *Perank*, the Utah Supreme Court reversed the Utah Court of Appeals in *Hagen* and held that the crime committed by petitioner Hagen did not occur in Indian country. *State v. Hagen*, 191 Utah Adv. Rep. 26 (1992). Thus, having failed to convince this Court

to reverse the *en banc* decision in *Ute* where the Tenth Circuit had the benefit of a complete factual record and exhaustive briefs of all interested parties, Utah now asks the Court to bless its position on a one-sided record put together by it alone on the authority of *Yazzie* – the sole example of a panel explicitly rejecting the considered legal conclusions of an *en banc* opinion of the same federal Court of Appeals.

II. *YAZZIE*'S CONCLUSION THAT USE OF THE PHRASE "RESTORE TO THE PUBLIC DOMAIN" PROVIDES PERSUASIVE EVIDENCE OF A CONGRESSIONAL INTENT TO DIMINISH IS INCONSISTENT WITH THE DECISIONS OF THIS COURT.

In *Solem v. Bartlett*, this Court observed that "even without diminishment, unallotted opened lands could be conceived of as being in the 'public domain' inasmuch as they were available for settlement." 465 U.S. 463, 475 n.17 (1984). Similarly, in *Rosebud Sioux Tribe v. Kneip*, this Court pointed out that "[t]he question of whether lands become 'public lands' . . . is therefore logically separate from a question of disestablishment." 430 U.S. 584, 601 n.24 (1977). *Solem* and *Rosebud* are consistent with the view of the Department of the Interior, which determined in an opinion concerning the Indian reservation at issue here that the "surplus lands of the Uintah and White River Utes are properly regarded as Indian lands" and that the use of the operative phrase "restore to the public domain" is "only a method of indicating that the lands are to be subject to disposition under the public land

laws." *Whether Surplus Lands in Uintah and Ouray Reservation are Indian Lands*, II Op. Sol. 1205 (1943). *Accord Restoration to Tribal Ownership of Ceded Colorado Ute Indian Lands*, 56 I.D. 330, 337-39 (1938) (declaration in 1880 statute that certain lands "shall be held and deemed to be public lands of the United States" is not inconsistent with their status as "surplus lands of an Indian reservation heretofore opened" under 25 U.S.C. § 463).

Many other decisions of this Court refute the notion that dispositive significance should be given to the fact that Indian lands were restored to the "public lands" or to the "public domain," phrases assumed to be synonymous in *Yazzie*. 909 F.2d at 1402. The meaning generally ascribed to "public lands" is "well settled." *Union Pac. R.R. v. Harris*, 215 U.S. 386, 388 (1910). The phrase simply describes lands " 'subject to sale or other disposal under general laws.' " *Id.*, quoting *Newhall v. Sanger*, 92 U.S. 761, 763 (1875). *See Utah Div. of State Lands v. United States*, 482 U.S. 193, 206 (1987). However, even this typical usage is not inflexible. *Kindred v. Union Pac. R.R.*, 225 U.S. 582 (1912), held that a statute granting a right of way through "public lands" contemplated a right of way grant through Indian lands. The Court observed that although "public lands" ordinarily means "such lands as are subject to sale or other disposal under general laws . . . it sometimes is used in a larger and different sense." *Kindred*, 225 U.S. at 596. Thus, in *Amoco Prod. Co. v. Gambell*, the Court "reject[ed] the assertion that the phrase 'public lands,' in and of itself, has a precise meaning, without reference to a definitional section or its context in a statute." 480 U.S. 531, 548-49 n.15 (1987).

Indeed, in 1864 Congress *equated* "Indian or other reservations" with "public lands." 25 U.S.C. § 176. A century later, Congress demonstrated the same understanding, expressly excepting Indian reservations from the "public lands" to be studied by the Public Land Law Review Commission. Act of Sept. 19, 1964, § 10, 78 Stat. 982, 985 (formerly codified as 42 U.S.C. § 1400).

Yazzie overlooked these authorities in its search for the one true meaning of the phrase "restore to the public domain." After distinguishing the principal diminishment cases, including *Ute* whose conclusions it found "unexamined and unsupported," 909 F.2d at 1397-1400, *Yazzie* reviewed dictionary references and examined dissimilar statutes from other cases. 909 F.2d at 1401. *Cf. Hynes v. Grimes Packing Co.*, 337 U.S. 86, 115-16 (1949) ("one may not fully comprehend the statute's scope by extracting from it a single phrase, such as 'public lands' and getting the phrase's meaning from the dictionary or even from dissimilar statutes"). *Yazzie* determined that the "dictionary definitions . . . do not clearly resolve the potential ambiguity with respect to title and jurisdiction"; indeed, the definition of "public domain" quoted in *Yazzie* supports the view that it concerned only *ownership* of land, not jurisdiction over it. 909 F.2d at 1401.

Yazzie then made "deductions . . . largely based on inferential evidence." 909 F.2d at 1402. In an extended passage relied on *verbatim* in *Perank*, *Yazzie* examined dicta from several cases involving dissimilar statutes, reversed the proper presumption, and, ignoring *Ute*, stated that it "found no case where operative restoration language was not accepted as language of termination."

909 F.2d at 1404.[7] Be that as it may, this Court has made clear that each opening statute must be reviewed separately, because each is the "product of a unique set of tribal negotiation and legislative compromise." *Solem v. Bartlett*, 465 U.S. 463, 467 (1984).

Yazzie's inquiry into the general interpretation by the executive branch of restoration language "begin[s] with the Public Land Commission's history of the public domain, commissioned by Congress and issued in 1880." *Yazzie*, 909 F.2d at 1404. *Yazzie* observed that this document states that one procedure for "abolishing" an Indian reservation includes issuance of an order "restoring the

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[7] *Yazzie* should have stated that it could find no case where operative restoration language was held sufficient to extinguish reservation boundaries. *See Solem v. Bartlett*, 465 U.S. 463, 472 (1984) ("There are, of course, limits to how far we will go to decipher Congress' intention in any particular surplus land Act. When both an Act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands, we are bound by our traditional solicitude for the Indian tribes to rule that diminishment did not take place. . . . "); *Mattz v. Arnett*, 412 U.S. 481, 496-99, 504 & n.22 (1973); *United States v. Wounded Knee*, 596 F.2d 790, 794 (8th Cir.) ("[I]t would seem to be a usurpation of legislative authority to say that Congress *must* have meant thus and so; therefore we will simply plug the missing words into the Act."), *cert. denied*, 442 U.S. 921 (1979); *United States v. Grey Bear*, 828 F.2d 1286, 1290 (8th Cir. 1987) (although opening act contained language precisely suited to diminishment, reservation boundaries were unaffected because of lack of a commitment to pay for the opened land), *panel reh'g denied*, 836 F.2d 1086 (8th Cir. 1987), *vacated in part on other grounds on grant of reh'g en banc*, 836 F.2d 1088 (8th Cir. 1987), *on reh'g*, 863 F.2d 572 (8th Cir. 1988). *Cf. Seymour v. Superintendent*, 368 U.S. 351, 354 (1962) (Reservation "*vacated* and restored to the public domain" by act of Congress was diminished) (emphasis added).

lands to the public domain." U.S. Pub. Land Comm'n, *The Public Domain* (1880) at 243-44.

However, *Yazzie* overlooked the fact that the 1880 report itself refutes the contention that the "public domain" and Indian reservations were considered to be mutually exclusive. The report includes Indian reservations in one table summarizing various categories of land in the "public domain." *Id.* at 25-26. After equating the phrases "public lands" and "public domain," the report discusses surveys of Indian reservations in the chapter entitled "Surveys of the Public Lands." *Id.* at 10, 179. The "grand total" of land in Indian reservations was reported to be 154,436,362 acres. *Id.* at 247. Correspondingly, the "area of *public lands* in Indian reservations" was reported in another table to be 154,436,362 acres. *Id.* at 26 (emphasis added). The report concludes that land remaining in the "public domain" totals "830,284,276.43 acres, *inclusive* of Indian and military reservations." *Id.* at 531 (emphasis added).

Even if the one passage of the report emphasized in *Yazzie* were viewed in isolation, it would still be unreliable. *See* Paul W. Gates, *History of Public Land Law Development* 430-34 (1968). In 1882, William S. Holman, a recognized federal land expert, stated that the report was "not a work of permanent interest suitable for libraries, but only of temporary interest." 18 Cong. Rec. 6954 (1882). The report "provides little or no information about the way the land system was actually functioning." *History of Public Land Law Development* at 431. "One writer has shown that Donaldson [the author of the 1880 report] committed six important errors in one sentence concerning the grants of the saline lands to the states when they were admitted." *Id.* The author's prejudices led him to

"distort the facts" and give "obviously misleading accounts." *Id.* at 433-34. In contrast to the uncritical use of an isolated sentence in the 1880 report in *Yazzie*, a noted authority has warned that it should "be used with caution; it contains many inaccuracies." E. Louise Peffer, *The Closing of the Public Domain* 12 n.6 (1951). "Nothing of any value came of the recommendations" contained in the report. *Id.* at 14. Indeed, accepting one of the recommendations related to railroad land proved to be "among the most regrettable steps taken by Congress in land matters." *History of Public Land Law Development* at 429.

In imputing to Congress in the twentieth century a reliance on an obscure passage from an internally contradictory and discredited report issued in 1880, *Yazzie* missed the central fact that the phrase

> "public domain" . . . has no official definition. In its most general application, a public domain is meant to include all land owned by a government – any government, anywhere.

The Closing of the Public Domain at 5 (footnotes omitted).[8] The phrase had no official definition in 1880[9] and it has

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[8] *Accord Utah Div. of State Lands v. United States*, 482 U.S. 193, 212 n.4 (1987) (White, J., dissenting).

[9] Later reports of the Public Land Commission similarly include Indian reservations as part of the "public domain." *See Report of the Public Lands Commission*, S. Doc. No. 189, 58th Cong. 3d Sess. 306, 361 (1905). Official compilations of public land statutes equate Indian reservations and public lands. A 1916 compilation of "public land" statutes includes 38 pages of statutes relating to Indian reservations. *Public Land Statutes of the United States* 119-156 (U.S.G.P.O. 1916). Similarly, the 1931 compilation of "public land" statutes includes 73 pages of statutes relating to Indian reservations. *Public Land Statutes of the United States* 225-297 (U.S.G.P.O. 1931).

none now. *See Solem v. Bartlett*, 465 U.S. 463, 475 & n.17 (1984); *Amoco Production Co. v. Gambell*, 480 U.S. 531, 548-49 n.15 (1987).

III. AFFIRMANCE WOULD ENCOURAGE FURTHER ABUSE OF THE JUDICIAL PROCESS BY STATE ATTORNEYS SEEKING TO CIRCUMVENT ESTABLISHED PRECEDENT SOLELY FOR THE PURPOSE OF FORCING REVIEW BY THIS COURT.

The *en banc* decision in *Ute* followed an exhaustive examination of the facts and law in the district court and vigorous briefing and argument before the entire Court of Appeals by all interested parties. The counties and cities said there that the outcome of *Ute* would "define, *once and for all*, the governmental authority of the various parties in the area involved (absent further congressional involvement)."[10] As the Utah Court of Appeals noted, the federal courts in *Ute* "construe[d] federal statutes, federal regulations, and federal Indian policy,"[11] and, as Justice

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[10] Reply Brief of Appellee/Cross-Appellant Counties and Cities at 1, Nos. 81-1827, 81-1901 (10th Cir. 1982) (emphasis added). Indeed, the State of Utah did not even appeal the district court's ruling that the Uintah reservation was not disestablished in the area over which it now claims authority, stating that "it was difficult for any party to demonstrate reversible error." Brief of Appellee State of Utah on Rehearing En Banc at 1-2, Nos. 81-1827, 81-1901 (10th Cir. 1984).

[11] *State v. Hagen*, 802 P.2d 745, 747 (Utah App. 1990), *rev'd*, 191 Utah Adv. Rep. 26 (1992).

Zimmerman wrote in dissent, federal Indian law is the product of the "preeminent authority and a unique trust responsibility" of the United States. *State v. Perank*, 191 Utah Adv. Rep. 5, 22 (1992) (Zimmerman, J., dissenting). Indeed, the trust responsibility "arose largely from the federal role as a guarantor of Indian rights against state encroachment." *Washington v. United States Envtl. Protection Agency*, 752 F.2d 1465, 1470 (9th Cir. 1985), citing *United States v. Kagama*, 118 U.S. 375, 383-84 (1886); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). *See generally Oklahoma Tax Comm'n v. Sac and Fox Nation*, 113 S. Ct. 1985, 1991 (1993) (noting the " 'deeply rooted' policy in our Nation's history of 'leaving Indians free from state jurisdiction and control' "), citing *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 168 (1973) (internal quotation marks omitted).

Thus, although the suggestion of the Utah Court of Appeals that the Supremacy Clause bars state court disagreement with *Ute* may be overly cautious,[12] this case presents perhaps the least attractive circumstances for such second-guessing. In contrast with *Perank* and *Hagen*, *Ute* was decided after development of a complete factual record and with the vigorous participation of all interested parties. In *Ute*, federal law was interpreted by a federal court of appeals sitting *en banc*. The issue of diminishment is particularly sensitive with state governments, which have typically coveted authority over

[12] *State v. Hagen*, 802 P.2d at 747. *Cf. Lockhart v. Fretwell*, 113 S. Ct. 838, 846 (1993) (Thomas, J., concurring) (If state court follows lower federal court's interpretation of federal law, "it does so only because it chooses to and not because it must.").

Indian lands. Allowing Utah to make "opportunistic misuse of [a] petty criminal prosecution to readjudicate a settled issue," will encourage energetic prosecutors in all areas of the country to pursue a similar strategy for the "sole purpose of creating a conflict with the federal courts to force Supreme Court review."[13] *State v. Perank*, 191 Utah Adv. Rep. 5, 22-23 (1992) (Zimmerman, J., dissenting).

Moreover, the conceded lack of participation by the United States and the Utes in *Hagen* and *Perank* is further exacerbated by the unprecedented procedures in *Yazzie*, upon which the decision below ultimately rests. Contrary to consistent Tenth Circuit precedent,[14] the *Yazzie* panel pointedly rejected the governing legal standard established by the *en banc* decision in *Ute*, effectively preempting a full presentation on this issue by the tribal party in *Yazzie*. The decision making in the case before the Court has been grossly distorted by the absence of effective articulation and consideration of tribal and federal interests.

[13] A partial list of the diminishment cases decided by the lower courts appears in *Felix S. Cohen's Handbook of Federal Indian Law* 44 n.153 (R. Strickland ed. 1982).

[14] *See, e.g., United States v. Taylor*, 828 F.2d 630, 633 (10th Cir. 1987); *United States v. Berryhill*, 880 F.2d 275, 277 (10th Cir. 1989), *cert. denied*, 493 U.S. 1049 (1990); *Huffman v. Caterpillar Tractor Co.*, 908 F.2d 1470, 1481 (10th Cir. 1990); *United States v. Spedalieri*, 910 F.2d 707, 710 n.3 (10th Cir. 1990).

CONCLUSION

Utah's attempt to relitigate *Ute* depends on its contention that use of the phrase "restore to the public domain" is persuasive evidence of a congressional intent to diminish. Upon close examination, the authority on which Utah's position ultimately rests, *Yazzie*, is insubstantial, relying as it does on inconclusive dictionary references, deductions and inferences bordering on speculation, an internally contradictory and discredited report issued in 1880, and – most fundamentally – an abandonment of the principles of statutory construction set forth so clearly by this Court in *Solem v. Bartlett*.

Respectfully submitted,

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